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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/770,187	02/02/2004	Robin A. Adair	5-0235-001	9381
803	7590	08/23/2005	EXAMINER	
STURM & FIX LLP 206 SIXTH AVENUE SUITE 1213 DES MOINES, IA 50309-4076			FERGUSON, MICHAEL P	
		ART UNIT		PAPER NUMBER
				3679

DATE MAILED: 08/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/770,187	ADAIR, ROBIN A.	
	Examiner	Art Unit	
	Michael P. Ferguson	3679	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 04 August 2005.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-15 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-13 is/are rejected.

7) Claim(s) 14 and 15 is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 02 February 2004 is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. _____.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
 Paper No(s)/Mail Date _____.

4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date. _____.

5) Notice of Informal Patent Application (PTO-152)

6) Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 1-13 are rejected under 35 U.S.C. 102(e) as being anticipated by Foster (US 6,625,925).

As to claim 1, Foster discloses a fence guard construction capable of preventing the growth of vegetation in the vicinity of a fence wherein, the construction comprises:

a first end cap member **50** including a closed end **52** elongated hollow rectangular body (rectangular body **62**; shown in Figure 5) having a substantially rectangular shaped open space therein (a rectangular shaped opening is defined on the back of cap member **50**; Figure 3, column 4 lines 34-41) and an open distal end **15**;

a second end cap member **50** including a closed end **52** elongated hollow rectangular body having a substantially rectangular shaped open space therein and an open proximal end **15** provided with a connector flange **35**; and

an intermediate segment **13** including an open ended elongated hollow rectangular body having a substantially rectangular shaped open space therein and a connector flange **32** disposed on one of the open ends (Figures 1-5).

As to claim 2, Foster discloses a construction wherein the first and second end cap members **50**, as well as, the intermediate segment **13** have their external surfaces provided with a simulated brick appearance (Figures 1 and 5).

As to claim 3, Foster discloses a construction wherein each of the end cap members **50** is provided with a horizontal mounting flange **14** and a vertical mounting flange **22** (Figure 3).

As to claim 4, Foster discloses a construction wherein the vertical mounting flange **22** is formed in a rear wall portion **22** of the hollow rectangular bodies and at the terminus of a semi-conical recess (defined by semi-conical cross-section of flange **22**; Figure 11) formed in a top surface of the hollow rectangular bodies (Figures 10 and 11).

As to claim 5, Foster discloses a construction wherein the intermediate segment **13** is provided with vertical mounting flange **22** and a horizontal mounting flange **14** (Figure 2).

As to claim 6, Foster discloses a construction wherein the vertical mounting flange **22** is formed in a rear wall portion **22** of the hollow rectangular bodies and at the terminus of a semi-conical recess (defined by semi-conical cross-section of flange **22**; Figure 11) formed in a top surface of the hollow rectangular bodies (Figures 10 and 11).

As to claim 7, Foster discloses a fence guard construction capable of preventing the growth of vegetation in the vicinity of a fence wherein, the construction comprises:

a first end cap member **50** including a closed end **52** elongated hollow rectangular body (rectangular body **62**; shown in Figure 5) having a substantially

rectangular shaped open space therein (a rectangular shaped opening is defined on the back of cap member **50**; Figure 3, column 4 lines 34-41) and an open distal end **15**; and a second end cap member **50** including a closed end **52** elongated hollow rectangular body having a substantially rectangular shaped open space therein and an open proximal end **15** provided with a connector flange **32** which is adapted to be received in the open distal end of the first end cap member (Figures 1-5).

As to claim 8, Foster discloses a construction comprising an intermediate segment **13** including an open ended elongated hollow rectangular body having a connector flange **32** disposed on one of the open ends (Figure 2).

As to claim 9, Foster discloses a construction wherein the first and second end cap members **50**, as well as, the intermediate segment **13** have their external surfaces provided with a simulated brick appearance (Figures 1 and 5).

As to claim 10, Foster discloses a construction wherein each of the end cap members **50** is provided with a horizontal mounting flange **14** and a vertical mounting flange **22** (Figure 3).

As to claim 11, Foster discloses a construction wherein the vertical mounting flange **22** is formed in a rear wall portion **22** of the hollow rectangular bodies and at the terminus of a semi-conical recess (defined by semi-conical cross-section of flange **22**; Figure 11) formed in a top surface of the hollow rectangular bodies (Figures 10 and 11).

As to claim 12, Foster discloses a construction wherein the intermediate segment **13** is provided with a vertical mounting flange **22** and a horizontal mounting flange **14** (Figure 2).

As to claim 13, Foster discloses a construction wherein the vertical mounting flange **22** is formed in a rear wall portion **22** of the hollow rectangular bodies and at the terminus of a semi-conical recess (defined by semi-conical cross-section of flange **22**; Figure 11) formed in a top surface of the hollow rectangular bodies (Figures 10 and 11).

Allowable Subject Matter

3. Claims 14 and 15 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

4. The following is a statement of reasons for the indication of allowable subject matter:

As to claims 14 and 15, Foster discloses the claimed construction with the exception of including a fence post disposed in soil for holding the fence post upright and the vertical mounting flange is directly attached to the fence post with a fastener.

There is no teaching or suggestion, absent the applicant's own disclosure, for one having ordinary skill in the art at the time the invention was made to modify a construction as disclosed by Foster to have the above mentioned elemental features.

Response to Arguments

5. Applicant's arguments filed August 4, 2005 have been fully considered but they are not persuasive.

As to claims 1 and 7, Attorney argues that:

Foster does not disclose a fence guard construction comprising a first end cap

member including a *rectangular body having a substantially rectangular shaped open space therein*; a second end cap member including a *rectangular body having a substantially rectangular shaped open space therein*; and an intermediate segment including a *rectangular body having a substantially rectangular shaped open space therein*.

Examiner disagrees. As to claims 1 and 7, Foster discloses a fence guard construction comprising a first end cap member **50** including a rectangular body (rectangular body **62**; shown in Figure 5) having a substantially rectangular shaped open space therein (a rectangular shaped opening is defined on the back of cap member **50**; Figure 3, column 4 lines 34-41); a second end cap member **50** including a rectangular body having a substantially rectangular shaped open space therein; and an intermediate segment **13** including a rectangular body having a substantially rectangular shaped open space therein (Figures 1-5).

As to claims 4,6,11 and 13, Attorney argues that:

Foster does not disclose a construction wherein the vertical mounting flange is formed at the terminus of a semi-conical recess formed in a top surface of the hollow rectangular bodies.

Examiner disagrees. As to claims 4,6,11 and 13, Foster discloses a construction wherein the vertical mounting flange **22** is formed at the terminus of a semi-conical recess (defined by semi-conical cross-section of flange **22**; Figure 11) formed in a top surface of the hollow rectangular bodies **62** (Figures 5,10 and 11).

Conclusion

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael P. Ferguson whose telephone number is (571)272-7081. The examiner can normally be reached on M-F (8:00-5:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on (571)272-7087. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 3679

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



MPF
08/18/05



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